SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 787 39

INTERNATIONAL LADIES' GARMENT WORKERS UNION,

Petitioner,

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION AND NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CLIF LANGSDALE,
CLYDE TAYLOR,
Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 787

INTERNATIONAL LADIES' GARMENT WORKERS UNION,

Petitioner,

vs.

DONNELLY GARMENT COMPANY, A CORPORATION, DONNELLY GARMENT WORKERS' UNION AND NATIONAL LABOR RELATIONS BOARD,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, International Ladies' Garment Workers Union, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the 8th Circuit, entered on October 29, 1945, which set aside and for naught held the findings and order of the National Labor Relations Board (50 N. L. R. B. 241) in a review proceeding by said Court of Appeals, under the provisions of National Labor Relations Act.

Opinion Below

The opinion of the Circuit Court of Appeals for the 8th Circuit, sought to be reviewed, is reported in 151 Federal Reporter, 2d Series, 854 (Advance Sheets January 14, 1946).

Jurisdiction

The petition for certiorari has been timely filed. The judgment of the Circuit Court of Appeals, sought to be reviewed, was rendered October 29, 1945. No motion for rehearing was filed. The jurisdiction of this Court is invoked under Section 240 Judicial Code, 43 Stat. 938, Title 28, Section 347 U. S. C. A.

Summary Statement of the Matter Involved

I

Nature of Proceeding Below

The proceeding below was upon the petition of the Donnelly Garment Company, called the Employer, to review and set aside an order of the National Labor Relations Board entered June 9, 1943 (50 N. L. R. B. 241), requiring the dis-establishment of the Donnelly Garment Workers' Union, called the Company Union, and the abrogation of its contracts with the Employer. The Board, in its answer, prayed the Court to enforce said order. The Company Union and the International Ladies' Garment Workers' Union (called the International Union, the Petitioner in this court) intervened.

II

Course of Litigation

There had been a previous hearing before the Board resulting in a similar finding and order, which were set aside by the Court of Appeals in *Donnelly Garment Com-*

pany v. *National Labor Relations Board*, 123 F. (2d) 215. That decision held that the order was void for lack of due process in that the Trial Examiner had excluded testimony of employees, members of the Company Union, in substance and to the effect that such employees had joined the Union of their own free will and without coercion or other unlawful conduct upon the part of the Employer.

(This is called the Employees' Testimony.) That order recited:

> "We think that the least that the Board can do in order to cure the defects in its procedure, caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and the conclusions upon which it is based; to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence, together with all other competent and material evidence in the record, before making new findings and a new order." 123 Fed. 2d l.c. 225.

Accordingly the Board set aside its order and sent the matter back to the Trial Examiner to receive and consider the excluded evidence. The Trial Examiner received, considered and weighed, and the Board considered and weighed, such evidence formerly excluded. It is beyond question, in fact the Court of Appeals in this case holds, that such employees' evidence, rejected in the first hearing, had in the second hearing been received and that the Trial Examiner committed no error in his rulings as to the admission of such evidence.

III

Ground on Which the Court of Appeals in this Case Set Aside the Board's Order

There is but one ultimate ground on which the order was set aside, which is for want of due process in the proceedings upon which the order was based.

> "On Consideration Whereof, It is now here Ordered, Adjudged and Decreed by this Court That the prayer of the National Labor Relations Board for a decree of this Court enforcing the order under review is hereby denied for want of due process in the proceedings upon which the order is based, and said order is hereby set aside." (Court of Appeals Decree, October 29, 1945.) (Vol. XIII, R. 71.)

IV

Premises on Which the Court Based Its Decision of Lack of Due Process

While the sole ground for setting aside the order was lack of due process, the opinion specifies several premises from which it draws such conclusion. Of these *seriatim*.

A

The opinions hold that due process was denied because, while the employees' testimony was received and there was no error in the receipt or rejection thereof, yet the Board did not give the consideration thereof, or probative value thereto, which the Court of Appeals believed such testimony was entitled to have.

In conclusion of the division of the opinions dealing with this subject these opinions state:

> "It seems to us that the Company and the Plant Union are justified in contending that the evidence of

> the employees tending to show lack of domination and interference by the Company received no difference or greater consideration upon the second hearing than it did upon the first, and that it was disregarded in both hearings."

Again, Judge Reddick, upon this branch of the case, stated:

> "I think it clear beyond question that there was denial of due process in the hearing before the Board, because of the Board's refusal to give any weight to some of the material evidence received, as well as because of its refusal to hear material evidence offered by the Garment Company and the Plant Union" (Vol. XIII, R. 55.)

The Trial Examiner in his report stated (Vol. X, 3848):

> "The undersigned accorded the respondent and the D.G.W.U. an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing. * * * Upon the record thus made and from his observation of the witnesses, the undersigned makes, in addition to the foregoing, the following findings of fact."

Here follow the findings that the Employer had been guilty of unfair labor practices as charged.

The Board in its decision and order of June 9, 1943 (Vol. A, 619), stated:

> "The Board has considered the intermediate reports the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations made by the Trial examiner, with the exceptions and qualifications noted below: In remanding the case to the Board for further hearing the Circuit Court directed that the respondent and the D.G.W.U. be permitted to adduce the previously proffered testimony of respondent's employees to show in substance that they were not influenced,

> interfered with, or coerced, by their bargaining representative. In compliance with the Court's mandate and pursuant to the respective offers of proof submitted by the respondent and the D.G.W.U. at the original hearing the Board has permitted the introduction of such testimony. We have carefully considered all such evidence adduced by the respondent and the D.G.W.U. We find, however, that the testimony in question does not overcome more postive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D.G.W.U., which subjected that organization to the respondent's domination and which removed from the employees' selection of the D.G.W.U. the complete freedom of choice which the Act contemplates. * * * Consideration of all the evidence convinces us and we find that the respondent dominated and interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" ((Vol. XIII, p. 25.)

The court decision in this respect is not based on the rejection of the employees' evidence, but is based squarely upon what the Court conceived the Board did with such evidence after it was received. It was the failure of the Board to give what the Court conceived was the proper weight to the evidence, that constituted denial of due process.

Judge Sanborn states that the employees' evidence "received no different or greater consideration upon the second hearing than it did upon the first and that it was disregarded in both hearings." Judge Reddick says that there was denial of due process because of the Board's "refusal to give any weight to some of the material evidence received." The Court in this respect did weigh the evidence and did set aside the order of the Board because the Court's opinion differed from the Board's opinion on whether such evidence was entitled to any weight when considered in

light of the entire record and more positive evidence therein to the contrary.

B

The Court held that the ruling of the Trial Examiner, excluding several items of evidence tendered by the Employer, denied to the Employer due process of law. These items are as follows:

(1) The International Union contended that certain provisions of the contract between the Employer and the Company Union constituted unfair labor practice. The Examiner excluded certain evidence to the effect that the International Union had entered into contracts with various other employers containing provisions similar to the provisions of the contract between the Company and the Company Union.

(2) It was contended before the Examiner that certain employees were supervisory employees so that their conduct was binding upon the employer. The Examiner excluded evidence tending to show that the International Union admitted to membership at other plants employees holding similar positions.

(3) The Trial Examiner excluded evidence proffered by the Company to show that the International Union had conducted a secondary boycott of the Company's products, conducted violent strikes at other plants and threatened to conduct such a strike at the Company's plant unless the Company signed a closed shop contract with it.

(4) There was evidence to show that in 1935 there had been an uncompleted hearing before the N.R.A. Board and that the Company had discriminated against employees whose discharges were the subject of such hearing before the N.R.A. Board. At the second hearing the Company sought to introduce evidence that it had not discriminated

against employees whose discharges were the subject of inquiry before the N.R.A. In the first hearing the Examiner did, in fact, receive all evidence offered by the Company on this subject. At the second hearing the Examiner refused to receive additional evidence upon that subject. None of the additional evidence was claimed to have been unavailable at the time of the first hearing.

The Court held that the exclusion of the foregoing items constituted a denial of due process to the Company and for that reason the Court set aside the findings and order of the Board.

C

The Court held that the Employer was deprived of due process of law because the Board refused to designate a Trial Examiner for the second hearing other than the one who conducted the first hearing.

It was contended by the Employer in the first case that the Company had been deprived of due process of law because of the prejudice of the Trial Examiner. The Court, in its first decision, 123 Fed. 2d, l.c. 219, decided that there was no such bias and prejudice on the part of the Trial Examiner as to constitute a denial of due process. The Court said:

> "We think that it cannot be said that it appears from the record of the proceedings before the Examiner and before the Board that there was a denial of due process because of bias and prejudice or collusion. If, as petitioners contend, the Trial Examiner and the Board ruled erroneously with respect to the issues to be tried, or in the exclusion of evidence, and drew unwarranted inferences from the evidence adduced, that would not justify a conclusion that either the Examiner or the Board was prejudiced or deliberately unfair. That the Examiner made comments which might better have been omitted, with respect to the attitude of the petitioner's witnesses, or of the character of their testi-

mony, is not enough to show a denial of due process. Compare Cupples Co. vs. National Labor Relations Board, 8th Cir. 106 Fed. 2d 100, 113; Goldstein vs. United States, 8th Cir. 63 Fed. 2d 609, 612, 614." Donnelly Garment Co. vs. National Labor Relations Board, 123 Fed. 2d 215, l.c. 219.

The record on the second hearing is devoid of any action on the part of the Trial Examiner that could conceivably have been evidence of bias or prejudice. The opinion in this case concedes the good faith and honesty of decision both to the Examiner and the Board. The opinion states:

> "We think however, that a ruling by this Court that the proceedings of the Board lack due process because the alleged bias and prejudice against the Company and the Plant Union is not justified" (Vol. XIII, R. 40.)

The sole basis of the decision setting aside the Board's order because of its refusal to appoint another Examiner, is that the Examiner in the first hearing excluded the employees' evidence because he was then convinced, and so ruled, that such evidence was not admissible and was then by him "considered to be of no value or materiality." The record shows that after the Court of Appeals had held that such evidence was admissible the Trial Examiner accepted such ruling and did receive the evidence and did consider it. Nor is there anything in the record nor in the opinion to indicate that the Examiner at the second hearing was swayed as to the admissibility, or value, of such evidence by reason of the fact that prior to the Court's decision in the first case the Examiner had conceived and held that such evidence was not admissible. The opinion means that, solely because an Examiner at a prior hearing believed and ruled that given evidence was inadmissible, such Examiner by reason of such ruling was so disqualified as to further hearings as to render any such further hearing before him devoid of due process.

V

THE FACTUAL ASPECT OF THE CASE. FACTUALLY THE RECORD SUPPORTS THE BOARD'S FINDINGS. THIS IS CONCEDED BY THE OPINIONS.

The opinion makes exceedingly clear that from a factual standpoint there was substantial and sufficient evidence to show that the Company was guilty of the unfair labor practices charged.

The opinion states that there are two factual pictures each supported by substantial evidence in the record. One picture is that the Employer had fostered, dominated and supported a company union and the Employer had entered into a closed shop agreement with such union for the purpose of assisting the Company Union, which is a picture of unfair labor practice. The other picture is that of a group of employees on friendly terms with the employer, satisfied with wages and working conditions, desiring to avoid strikes and labor trouble, formed for their own protection, and completely independent of the employer, which is not a picture of unfair labor practice.

The Board ruled that the picture disclosing unfair labor practice was the true picture, and that the picture as presented by the Employer and the Company Union was not a true picture.

Judge Sanborn's opinion contains the following:

> "The picture drawn by the International and the Board is that of an employer which, solely because of hostility to the International, has influenced and coerced its employees into forming a plant Union and entering into a closed shop agreement, thus depriving them of their freedom of action and choice and making them in effect the bond servants of their employer." (Vol. XIII, R. 37.)

(Manifestly, if this is a true picture the Board was justified from a factual standpoint in making the order in question.)

The opinion continues:

> "The picture which the company and the plant union present is that of a group of employees, on friendly terms with their employer, satisfied with their wage and working conditions, and desirous of avoiding strikes and labor troubles, who, upon the advice of their counsel and for their own protection against an unjustified and unlawful attempt by the International to force them to become, and to force their employer to make them become, members of that union against their will, voluntarily formed and have satisfactorily administered their own completely independent union.
>
> The question as to which is the true picture insofar as that presents a question of fact is not a matter with which this court can concern itself." (Vol. XIII, R. 37.)

It is therefore beyond dispute that the decree of the Circuit Court of Appeals cannot be justified because of failure of proof by substantial and sufficient evidence showing violations of the National Labor Relations Act justifying the order of the Board.

Questions Presented

One

Where, in a review proceeding under the National Labor Relations Act, certain evidence has been received by the Board and the Board, in its findings, declares that it has "permitted the introduction of such testimony", and has "carefully considered all such evidence", whether the Court of Appeals has jurisdiction to set aside the findings and order of the Board because the Court is convinced that, not-

withstanding such declaration by the Board, yet the Board did not give to such testimony so received the consideration and the weight which the Court believes it should have received—all this where admittedly there was substantial and sufficient evidence to support the findings of the Board. Is such ruling beyond the jurisdiction of the Court to review findings of the Board granted and limited by the National Labor Relations Act? Para. (e) and (f) Section 160, Title 29 U. S. C. A.

Two

Whether, in a review proceeding under the National Labor Relations Act, the Court has jurisdiction to set aside the findings and order of the Board because of the rejection of evidence before the Examiner, on the grounds that such action by the Examiner constitutes a denial of due process, except in cases where the rejected evidence is direct, fundamental and vital—not incidental or collateral to the primary issues involved. Is the inherent power of the Court to protect the constitutional right to fair trial, as regards that receipt of evidence by an administrative board, coextensive with the court's authority to grant new trial in an appeal from court to court in a purely judicial proceeding?

Three

Is the Court of Appeals authorized to set aside the findings and order of the Board, on the ground of denial of due process of law, because the Court is of the opinion that the Trial Examiner was disqualified to conduct the hearing, when Congress has imposed in the Board the authority to appoint such examiners and has made the Board judge of their qualifications? (Title 29, Sections 154, 155, U. S. C. A.)

FOUR

If the Court is authorized under any circumstances in setting aside the findings and order of the Board because the Court is of the opinion that the Trial Examiner was disqualified, then is the Court justified in so doing upon the following facts:

When in a previous hearing before the Examiner he excluded certain evidence, called employees evidence, stating that he was convinced that the same was immaterial, inadmissible and entitled to no weight. Where the Court, in a previous review, declared that such evidence was competent and entitled to consideration and remanded the proceeding for the receipt thereof. Where the Trial Examiner in the second hearing did receive all such evidence, formerly excluded, and where, in this case, the Court has held that the Examiner committed no error in his rulings concerning the receipt of such testimony. Where there is nothing in the record nor opinion to indicate that the Examiner at the second hearing was swayed as to the admissibility of such evidence by reason of the fact that prior to the Court's decision in the first case the Examiner conceived and held that such evidence was not admissible. Was the Court, under the foregoing condition of the record, justified in holding that the Examiner was disqualified by reason of his rulings in the first hearing, and in holding, by reason thereof, the findings and order of the Board should be set aside?

FIVE

Whether the evidence excluded by the Examiner, specified in paragraphs (1), (2), (3) and (4), of Division B, of the Summary Statement, was admissible in any event and whether the exclusion thereof would justify a court in reversing the judgment, even in a judicial proceeding upon appeal from court to court.

SIX

Whether the Court of Appeals has not treated its jurisdiction to review findings and order of an administrative Board, as co-extensive with its judicial authority to review legal proceedings as upon appeal from court to court. Whether the Court of Appeals has not far exceeded its jurisdiction to review an action by an administrative Board, as specified and limited by paragraphs (e) and (f), Section 160, Title 29, U. S. C. A. Whether in any event the Court has not confused and confounded judicial power to review actions of an administrative Board, with the jurisdiction on appeal from court to court, to such a degree as to leave the legal situation intolerable.

Reasons Relied On for the Allowance of the Writ

There are special and important reasons for this Court to exercise its sound judicial discretion and grant the writ.

The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal.

The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings concerning the review by the federal courts of actions by administrative boards, as to call for an exercise of this Court's power of supervision.

The Court of Appeals has extended its jurisdiction to review proceedings by administrative boards so as to be practically co-extensive with the jurisdiction of that court to review decisions of lower courts upon appeal in ordinary legal proceedings. The demarcation between the jurisdiction of the Circuit Court of Appeals in the two kinds of

proceedings should again be made clear by the Supreme Court, through certiorari in this case.

The reasons relied upon for the allowance of the writ are specified and amplified and applied to the record in the Brief accompanying this Petition, but which, for the sake of brevity, are not here repeated.

Conclusion

Wherefore and by reason of all which the petitioner respectfully prays that this Court shall issue its writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

CLIF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Petitioner,
International Ladies' Garment Workers Union.

Address of Attorneys:

922 Scarritt Building,
Kansas City, Missouri.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 787

INTERNATIONAL LADIES' GARMENT WORKERS UNION,

Petitioner,

vs.

DONNELLY GARMENT COMPANY, A CORPORATION, DONNELLY GARMENT WORKERS' UNION AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF PETITIONER INTERNATIONAL LADIES' GARMENT WORKERS UNION, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I

The Petition for the writ of certiorari contains, so that there is not here repeated, the following:

A. Reference to the official report of the decision below.

B. Statement of the grounds on which the jurisdiction of this court is invoked.

C. A concise statement of the case containing all that is material to the consideration of the questions presented.

D. Questions presented.

E. Reasons relied on for the issuance of the writ:

II

There is in this brief presented:

(a) A specification of the assigned errors intended to be urged;

(b) further specifications of the grounds and reasons for the court to exercise its discretion for the issuance of the writ, supporting citations and application thereof to the record herein;

(c) argument.

III

Specification of Errors Intended to Be Urged

A

The Court, in conflict with decisions of other Courts of Appeal and of the Supreme Court, and in violation of the National Labor Relations Act, 49 Stat. 449, and particularly paragraphs (e) and (f) Section 160, has weighed the Employees' Testimony and set aside the order of the Board because the Court was of the opinion that the Board did not give to the Employees' Testimony the consideration and weight the Court deemed it entitled to have. What weight, if any, when considered in light of the entire record, the Employees' Testimony was entitled to have, was for the Board alone. The Court may not directly or indirectly enter that field, all the way in, or at all. The Board's power to weigh evidence is the power to reject, because not believed, in part or in toto. Even uncontradicted evidence is not proof until it is accepted as proof by the triers of

fact. (*Gannon v. Laclede Gas Co.*, 145 Mo. 502, 46 S. W. 968.)

In the particular above specified the decision is in conflict with National Labor Relations Act, 49 Stat. 449, and particularly paragraph (e) Section 160. "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," and paragraph (f), "and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

Such decision in said particular is also in conflict with the following decisions by the Supreme Court and by the various Circuit Courts of Appeal.

The decision is in conflict with the following decisions by the United States Supreme Court and the various Circuit Courts of Appeal:

National Labor Relations Board v. *Virginia Electric & Power Company*, 314 U. S. 469, 62 S. Ct. 344, l. c. 348;

National Labor Relations Board v. *Link-Belt Company*, 311 U. S. 584, 61 S. Ct. 358;

National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851;

National Labor Relations Board v. *Nevada Consolidated Copper Corp.* 316 U. S. 105, 62 S. Ct. 960;

National Labor Relations Board v. *Independent Union of Craftsmen*, 311 U. S. 584, 61 S. Ct. 358;

Boeing Airplane Co. v. *National Labor Relations Board*, 140 Fed. (2d) 423 (10 C. C. A.);

National Labor Relations Board v. *Waterman S. S. Corp.*, 309 U. S. 206, 60 S. Ct. 493;

National Labor Relations Board v. *Southern Bell Telephone Company*, 319 U. S. 50, 63 S. Ct. 905.

Where the Board's finding is based upon reasonable inference, the court cannot interfere upon the ground that the opposite inference could have as reasonably been drawn.

National Labor Relations Board v. *Southern Association Bell Telephone Employees*, 319 U. S. 50, 63 S. Ct. 905;

Montgomery Ward & Co. v. *National Labor Relations Board*, 107 Fed. (2d) 555 (7 C. C. A.);

Wilson & Co. v. *National Labor Relations Board*, 124 Fed. (2d) 845 (7 C. C. A.);

Swift & Co. v. *National Labor Relations Board*, 106 Fed. (2d) 87 (10 C. C. A.);

The credibility of witnesses is exclusively for the Board.

Greenport Basin & Construction Co. v. *National Labor Relations Board*, 132 Fed. (2d) 857 (2 C. C. A.);

Oughton v. *National Labor Relations Board*, 118 Fed. (2d) 486 (3 C. C. A.);

American Enka Corporation v. *National Labor Relations Board*, 119 Fed. (2d) 60 (4 C. C. A.);

Humble Oil & Refining Co. v. *National Labor Relations Board*, 140 Fed. (2d) 777 (5 C. C. A.);

New Idea v. *National Labor Relations Board*, 117 Fed. (2d) 517 (7 C. C. A.);

Cupples Company v. *National Labor Relations Board*, 106 Fed. (2d) 100 (8 C. C. A.);

Swift & Company v. *National Labor Relations Board*, 106 Fed. (2d) 87 (10 C. C. A.).

The finding of the Board may be based upon hearsay testimony where it is the kind on which reasonable men are accustomed to rely.

National Labor Relations Board v. *Remington Rand, Inc.*, 130 Fed. (2d) 919 (2 C. C. A.);

I. A. of M. v. *National Labor Relations Board*, 110 Fed. (2d) 29, (D. C. C. C. A.), l. c. 35, affirmed 311 U. S. 72, 61 S. Ct. 83;

The ordinary rules of evidence are not controlling in proceedings of the Board. "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." (N. L. R. B. Sec. 160, Par. B.)

The Board has the authority to fix its own standards of proof. The Board may choose the criteria determinative of an issue of fact, it may reject evidence which has no materiality in view of the criteria adopted, and under those circumstances, the rejection of such evidence is not a denial of due process of law. (*Panhandle Eastern Pipeline Co.* v. *Federal Power Comm.*, 143 Fed. (2d) 488 (8 C. C. A.))

The Court undertook in conflict with *Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773, to go into the mental processes of the Board in arriving at its conclusions.

B

The Lower Court erred in holding that the rejection by the Examiner of four items of evidence described and identified in detail in subdivision B of division IV of the Summary Statement, denied to the Employer due process of law. None of such evidence was vital, controlling or immediately related to the primary issues in the case. It was collateral, secondary and had to do with "imponderables". Such ruling was at most a mere procedural error. Its rejection, even if erroneous, could not constitute denial of fair trial nor due process. Fair trial based upon due process means a trial under law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial. Mere procedural error in the receipt or rejection of evidence, does not violate the requirements

of fair trial within the meaning of due process of law, *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918, and particularly is the decision below in conflict with *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 308 U. S. 134, 60 S. Ct. 437 and *Fly* v. *Heitmeyer*, 309 U. S. 146, 60 S. Ct. 146.

C and D

The Lower Court erred in holding that the Employer was deprived of due process of law by reason of the refusal of the Board to appoint an Examiner other than the Examiner who heard the first proceeding. The National Labor Relations Act empowers the Board to appoint the Examiners and makes the Board the judge of their qualifications. Moreover, even if the Court had the judicial authority to review the action of the Board in the appointment of an examiner, the Examiner was not disqualified. The Lower Court held that neither he nor the Board were prejudiced. The fact that in the first hearing the Examiner then ruled that the Employees' Testimony was immaterial and without weight and therefore excluded, did not disqualify the Examiner who obeyed the ruling of the Court and admitted the evidence.

National Labor Relations Act Title 29, Section 154, 155;
Walker v. *United States*, 116 Fed. (2d) 458;
Ryan v. *United States*, 99 Fed. (2d) 864;
Refior v. *Lansing Drop Forge Co.*, 124 Fed. (2d) 440;
O'Malley v. *United States*, 128 Fed. (2d) 676;
Berger v. *United States*, 235 U.S. 22, 41 S. Ct. 230.

E

The Court erred in holding that the evidence specified in paragraphs (1), (2), (3), and (4) of division B of the

Summary Statement was admissible. Such evidence would have been inadmissible even in the trial of a suit at law. The ruling of the Court in this respect is in conflict with the following decisions:

(1) The Board properly excluded evidence which the Company sought to introduce to show that the International Union had entered into contracts with various employers containing provisions similar to those of the contract between the Company and the Company Union. (*Bethlehem Steel Company* v. *National Labor Relations Board*, 120 Fed. (2d) 641, 651, 653. (App. D. C.))

(2) The Board properly excluded the proffered testimony that the International Union admitted to membership at other plants employees holding positions similar to employees of the Company, which were claimed to be supervisory so that their acts bound the employer.

National Labor Relations Board v. *Aintree Corp.*, 132 Fed. (2d) 469, 472 (7 C. C. A.);

National Labor Relations Board v. *Engraving Company*, 123 Fed. (2d) 589, 593 (7 C. C. A.);

New Idea v. *National Labor Relations Board*, 117 Fed. (2d) 517, 524 (7 C. C. A.)

(3) The Board properly excluded certain evidence that the International Union had organized strikes with other employers and had been guilty of alleged conduct with respect thereto. The Court, in the first hearing, held that this evidence was inadmissible. A proper analysis of the facts in the case of *National Labor Relations* v. *Indiana and Michigan Electric Company* so far from supporting the opinion below, demonstrates that such opinion is in conflict with the holding in said case.

(4) The Board properly excluded evidence proffered by the Company to show that prior to 1935 the Company had

not discriminated against employees whose discharges were the subject of hearings before the old N. R. A. board. The Examiner and the Board did, in fact, receive all proffered evidence on that question at the first hearing but rejected additional evidence on that subject, none of which was claimed to have been unavailable at the time of the first hearing.

F

The Lower Court has treated its jurisdiction to review findings and orders of an administrative board as co-extensive with, similar with and analogous to, its judicial authority to review legal proceedings as upon appeal from court to court.

National Labor Relations Board v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918;

Federal Communications Comm. v. *Pottsville Broadcasting Co.*, 308 U. S. 134, 60 S. Ct. 437;

Fly v. *Heitmeyer*, 309 U. S. 146, 60 S. Ct. 146.

IV

Argument

ONE

The decision below is in fundamental conflict with paragraphs (e) and (f) of Section 160 of the National Labor Relations Act, and is also in conflict with the decisions by the Courts of Appeal and of the Supreme Court cited under division A of the specifications. In review proceedings the Court is confined to questions of law and has nothing to do here, that the findings and order were supported by substantial evidence. Once it is conceded, as here, that the findings and order were supported by substantial evidence, all question of fact goes out of the case. It is fundamental that the Court has no jurisdiction with

respect to the credibility of witnesses or the weight of evidence—that is solely a matter for the Board. Substantial evidence being present the Court cannot concern itself with the mental operations of the Board in arriving at its factual conclusion. (*Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773.) The Board is not required to believe even uncontradicted testimony, it may, if it deems proper in light of the entire record, disregard any testimony as totally without value. Even if the Board is required to receive material evidence, what it does with such evidence so received is not subject to judicial review. Evidence is not proof until accepted by the trier of fact. (*Gannon* v. *The LaClede Gas Co.*, 145 Mo. 502, 46 S. W. 968.)

Here the Examiner received the evidence. The Board declares that is considered it, but in light of the entire record and experience of the Board it considered such conclusionary evidence as immaterial and of no value.

The Court of Appeals sets its own opinion of the value of such evidence against the opinion of the Board. The Board, in its analysis of all of the record, and its experience in fact, held that such evidence was without weight. The Court holds that the Board should have given some weight thereto. There is no escape from the conclusion that the Court did undertake to weigh the evidence and fix the evidenciary value thereof.

The decision below extends the field of judicial review of proceedings of administrative boards clearly beyond that fixed by statute and court decisions. It is without precedent direct or by analogy. It should not stand as the law.

Two

The Court erred and its decision is in conflict with decisions of the Courts of Appeal and of the Supreme Court in holding that the Employer had been denied due process

of law by reason of the Examiner having excluded four items of evidence, which evidence is described and identified in detail in subdivision B of division IV of the Summary Statement. None of such evidence was vital, controlling or immediately related to the primary issues in the case; it was collateral, secondary and had to do with "imponderables". The receipt or rejection of such evidence at most was mere procedural error. Its rejection even if erroneous, could not constitute denial of fair trial nor due process.

The words Fair Trial do not occur in the constitution. The expression fair trial may, and in an appeal from court to court, does mean a trial free from material error. As used in a court's inherent power to prevent a denial of due process of law, fair trial does not mean a trial without error. As applied to the rejection of evidence it means that such rejected evidence must be so direct, controlling and vital that without it the fundamentals of due process of law are denied.

As applied to judicial proceedings fair trial, based upon due process, means a trial under law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial. (Webster's Argument in *Dartmouth College* v. *Woodward*, 4 Wheaton 517 l. c. 581) and a multitude of other decisions declaring and applying the principle (12 Corp. Jur. 1191).

Any trial which meets these requirements is a fair trial within the meaning of due process of law no matter what procedural errors may have been committed therein.

The law could not be otherwise. A contention that a given trial is not a fair trial because it denies due process of law necessarily raises a constitutional question. If procedural error in the rejection of competent evidence is a denial of due process then every case wherein there was such rejection of evidence would ultimately be for

final decision by the Supreme Court. If a Court of Appeals in a review proceeding under the National Labor Relations Act is to reverse the findings and order of the Board by reason of procedural errors in the receipt of evidence merely by stating that such rejection is a denial of due process of law, then all distinction, at least as far as the receipt of evidence is concerned, between the jurisdiction of the Court of Appeals under the National Labor Relations Act on the one hand, and jurisdiction of the Court in legal proceedings in an appeal from court to court on the other, is destroyed. Such ruling is necessarily in conflict with *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918, and particularly in conflict with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 308 U. S. 134, 60 S. Ct. 437, and *Fly* v. *Heitmeyer*, 309 U. S. 146, 60 S. Ct. 146.

Again, and in this respect, the Court of Appeals has exercised a jurisdiction clearly beyond the field fixed for it in such a proceeding as this by the Congressional Act and the decisions of this court and for that reason the decision should not be permitted to stand.

THREE and FOUR

The Court erred in holding that the Employer was deprived of due process of law because the Board refused to designate a Trial Examiner for the second hearing other than the one who conducted the first hearing. The Lower Court has declared and held that neither the Examiner nor the Board was prejudiced or deliberately unfair. The opinion states:

> "We think, however, that a ruling by this court that the proceedings of the Board lack due process because of the alleged bias and prejudice against the Company and the Plant Union is not justified."

The opinion also states:

> "We think that it cannot be said that it appears from the record of the proceedings before the Examiner and before the Board that there was a denial of due process because of bias and prejudice or collusion."

The sole ground for holding lack of due process because the Board refused to appoint another examiner in the further proceedings is that in the first proceeding the Examiner then ruled and declared that the Employee's Testimony was immaterial and without value and accordingly he then excluded such evidence.

It is submitted that Congress has placed the authority to appoint such Examiners in the Board and has made the Board judge of their qualifications. (Title 29, Section 154, 155.) The decision is in violation of the statute because the court has substituted its judgment as to the propriety of reappointing the examiner for that of the Board (*Hill* v. *Florida*, 65 S. Ct. 1273, June 15, 1945). Particularly is this so when it is conceded there was no actual bias or prejudice. It might be that an examiner could be so biased and prejudiced that his conduct of the hearing would constitute denial of due process. But such basis would have to be actual and well proven prejudice. It could not be based upon mere former rulings by the Examiner, especially where he scrupulously obeyed the order of the Court of Appeals in the first case to receive such evidence.

Even in an appeal from court to court the Appellate Court could not lawfully declare that an examiner or a master or a judge was disqualified to hear a given cause for the reason that in some former proceeding or in other proceedings he had made erroneous rulings. If the Examiner were a master or judge and this were an appeal from court to court, the Lower Court's opinion that the master or the

judge was disqualified for the reasons given in this opinion could not be sustained.

Walker v. *United States*, 116 Fed. (2d) 458 (9 C. C. A.);
Ryan v. *United States*, 99 Fed. (2d) 864;
Refior v. *Lansing Drop Forge Co.*, 124 Fed. (2d) 440;
O'Malley v. *United States*, 128 Fed. (2d) 676 (8 C. C. A.);
Berger v. *United States*, 255 U. S. 22, 41 S. Ct. 230.

FIVE

The Lower Court erred in holding that the Trial Examiner improperly excluded four items of evidence specifically described in paragraphs (1), (2), (3) and (4) of division B of the Summary Statement.

SIX

A careful reading of the opinions and consideration of the entire tenor thereof demonstrate, we submit, that the Court of Appeals has treated its jurisdiction to review findings and orders of an administrative board as co-extensive with, similar and analogous to, its judicial authority to review legal proceedings as upon appeal from court to court. These opinions could just as well have been written upon an appeal in a law case wherein a jury had passed upon the facts. There is not a single authority that the Court of Appeals could properly exercise in such a law appeal that it does not either expressly or by necessary assumption employ in this case. With this decision in hand lawyers may logically urge in future review proceedings that the Court of Appeals knows no restriction upon its general appellate jurisdiction and authority by reason of the proceedings being governed by the provisions of the National Labor Relations Act. As to procedural errors in the reception or rejection of evidence the Court, by saying that the receipt or rejection of evidence is a denial of due

process, extends its authority under the National Labor Relations Act to the full scope of general jurisdiction on appeal.

The Circuit Court of Appeals in such a proceeding as this has two sources of jurisdiction. The first is the inherent power of a court, independent of statute, to prevent the denial of due process. That jurisdiction is extremely limited and goes into the very vitals of constitutional fair trial. (Webster's Argument in *Dartmouth College* v. *Woodward*, 4 Wheaton 518.) The only other jurisdiction it has is that granted and limited by the National Labor Relations Act. There was here no denial of due process. The statutory limitations upon the statutory power to review have been disregarded.

This whole question of the jurisdiction of courts to review proceedings by administrative boards has been the subject of discussion by lawyers, bar associations, Congress and the Courts. One school seeks to extend such jurisdiction, and the other to restrict it. Congress has spoken and any further effective discussions must be confined to Congressional halls. That problem cannot be settled by a judicial decision such as the one at hand. For this reason the Supreme Court, upon this very vital question, should take jurisdiction. If nothing more the decision as it stands has confused and confounded the distinction between the two kinds of court review and for that reason the subject should be made clear by the Supreme Court.

Respectfully submitted,

CLIF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Petitioner.

Address of Attorneys: 922 Scarritt Building, Kansas City, Missouri.